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**BEFORE THE
INTERSTATE COMMERCE COMMISSION.**

THE ADVANCED FREIGHT RATE CASE.

**DOCKET No. 5860.
I. & S. DOCKET No. 333.**

ON REHEARING.

**ARGUMENT OF
GEORGE F. BROWNELL,**
VICE-PRESIDENT AND GENERAL SOLICITOR, ERIE R. R. CO.,
Of Counsel for the Carriers.

BEFORE THE

Interstate Commerce Commission.

DOCKET 5860.

REVENUES OF RAILROAD CARRIERS IN
OFFICIAL CLASSIFICATION TERRI-
TORY.

I. & S. DOCKET, No. 333.

RATE INCREASES IN OFFICIAL CLASSI-
FICATION TERRITORY.

REHEARING.

**ARGUMENT OF GEORGE F. BROWNELL, ON BEHALF
OF THE CARRIERS.**

Mr. Chairman and Gentlemen of the Commission:

I share the view expressed by Mr. Thorne that the railroads are now at a parting of the ways. Like him, I see them, in this case, where two ways diverge, with the Commission at the switch. To my vision, one of those ways marks the continu-

ance and extension of the public policy under which the railroads heretofore have had their remarkable development and progress—a public policy which has permitted and invited their construction, maintenance, and operation under private ownership and management with governmental regulation, and through capital secured from private investment. But the other way to which he asks you to divert the railroads would subject them and the public alike to serious dangers and difficulties, with the ultimate goal, which I believe is his desire, of Government ownership.

Mr. THORNE: You are entirely mistaken. I want to relieve you of that opinion.

Mr. BROWNELL: I judged that from the substance of the views he has expressed here and what I have understood to be views publicly advocated by him; and that, at least, is what seems to me where the way he advocates would lead as its ultimate goal. In reply to those views I quote these words of Commissioner Daniels in this case:

“Eventually it may come about that railroads will be owned and operated by the Government. That is a matter of public policy which it is not the province of the Commission to consider. But that such a departure from the present policy of private ownership and corporate operation should be materially hastened by the reluctance of new capital to invest in these properties would seem to be a grave indictment of our present system of regulation and control.”

In various other respects I cannot share the vision of my friend from Iowa. I cannot see the prosperity which the seems to think these railroads now revel in. I do not think that prosperity of that character has been seen before since Alice roamed with wondering eyes in Wonderland. * * * There seems to be a misconception on the part of some of the counsel for the opposition as to the scope of this rehearing. Mr. Brandeis, as I recall it, stated his understanding that the rehearing is strictly limited to the question whether the new evidence, limited strictly to the new facts, constitutes a reason why the former conclusions of the Commission should be modified. * * * I think that his view would unduly restrict the scope and character of this rehearing.

Counsel for the opposition have also fallen into error with respect to the contentions of the carriers as to the power of the Commission to do what is asked of them. We are not asking that the Commission undertake to exercise any powers not conferred upon them by law, but we assert that all the considerations which we have presented to the Commission are proper for them to take into consideration in determining the question at issue. We think our views in that regard are amply supported by both reason and authority, and that it is unnecessary to look beyond the provisions of the Interstate Commerce Act itself and the rulings of this Commission under it to support them.

Since the former hearing, and indeed even since the decision of July 29th was made, facts and circumstances have arisen which have materially changed the situation of the carriers and the conditions affecting them from those existing at the time of the former hearing, and which, taken in connection with the facts produced at the former hearing, we believe will fully justify the granting of the relief asked for. We believe that had the conditions at the time of the former hearing been what they now are, the decision of the Commission would have been very different. We applied to the Commission to grant a rehearing in view of such new facts and changed conditions, and the Commission granted the rehearing. We are therefore now here, not asking that the Commission assume to exercise any power beyond their lawful authority, but that, pursuant to the express provision for such case made and provided by Congress, they fully consider on this rehearing not only the facts and circumstances arising since the former hearing, but all the facts, *including* those arising before as well as since the former hearing.

Until the passage of the Hepburn Act in 1906 there was no express provision in the Interstate Commerce Act for rehearings. At that time Congress, anticipating, perhaps, that emergencies might arise when the Commission clearly should have the power to grant a rehearing on all the facts, including those arising since the original hearing, added a new section to the Act—Section 16a, providing

that after any decision has been made by the Commission, any party may make application for a rehearing of the same or any matter determined therein, and it shall be lawful for the Commission to grant such rehearing if sufficient reason therefor be made to appear. It further enacted that if in its judgment, after such rehearing and *a consideration of all facts, including those arising since the former hearing*, it shall appear that the original decision or order is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly.

For a rehearing and consideration such as that contemplated and provided for by Congress, it is essential that all the existing facts and conditions be considered with open mind and unprejudiced by the former decision made under other conditions.

On such a rehearing the question should be considered and determined upon all the facts as they now exist and brought down to date.

Among the new developments bearing upon the case is the great war, which was unforeseen when the former decision was made. To use the apt words of the President, the mighty forces of war and of change have disturbed the world. It has already involved most of Europe and a large part of Asia, Africa, and British North America. It has brought about an unparalleled destruction of wealth and dislocation of credit throughout the civilized world. It is probably the most momen-

tous event in modern history, and no one can yet clearly foresee its boundaries, its limits or its consequences. The sun never sets on the countries now involved, or, in fact, even on the present warfare. It is too early to estimate its effects, but it cannot be doubted that they will be world-wide, great and long-continuing. Probably what has already transpired is but the first shadow of what is yet to come. The old order of things has been shattered, and all the king's horses and all the king's men cannot restore the conditions existing a few months ago when the former hearing occurred. The effects of the war are not limited to the countries directly engaged, but they extend to neutral countries. They have already, in many ways, changed conditions in this country and have affected and will continue to affect the situation of these railroad companies in important ways pertinent to this inquiry.

The credit facilities of the civilized world have broken down. Moratoria have been declared in many countries, stock exchanges have been closed, foreign exchange has been seriously disarranged, and the world's machinery of credit, international, national and corporate, is endangered.

Wealth and property are being destroyed upon an enormous scale. The price of capital has already materially increased, and will continue to increase. Securities have already declined to a disturbing extent, and there is grave danger of a further serious decline.

The effect of the war on the supply of capital available for investment will inevitably be serious and great, it will materially increase the difficulty of the railroad companies in securing the new capital necessary for refunding, for improvements, and for other capital purposes, and will materially increase the cost of whatever new capital they may be able to secure for such purposes.

As shown by Mr. Conant, an international authority of high repute, the direct cost of the war, if it lasts approximately a year and does not extend to other countries, will not be materially less than fifteen billion dollars. This estimate of the appalling destruction of capital for war purposes is based upon the experiences in other recent wars, and includes only a conservative allowance for the cost per man per day of the millions of men engaged. It is supported by known facts as to actual disbursements already made and the estimates of some of the most eminent European economists. Even this vast sum does not take into consideration the loss of other vast sums resulting from destruction of property, the impairment of the industrial production, and the derangement of the machinery of distribution. Even if the duration of the war should happily prove to be less than a year, a large portion of the direct expense would continue during the process of reducing military forces to a peace basis, and a considerable time would be required for restoring to former conditions the industrial and economic fabric. So

that, even if an early cessation of the war should permit some reduction in the cost based upon the estimates for a year, it would still leave great sums—probably not less than ten billion dollars—to be raised by loans and taxation in the countries involved.

The amount of annual savings of capital throughout the world for investment, that is to say the amount of capital annually available for investment, is shown to be not much in excess of four billion dollars, so that, as shown by Mr. Conant, the demand for capital for purely war purposes and for the settlements which will succeed the war, will be so great as to absorb an amount equal to the entire savings for investment made in all civilized countries for a period of at least several years. Apparently some of the powers at war are already exhausting the moneys which were available to them for war purposes at the beginning of the war, and have already commenced to offer war loans. Germany has already offered loans amounting to more than one billion dollars for war purposes, and is contemplating the raising of two and one-half billion dollars to furnish employment for her people at home on internal improvements. England, France and other European countries, including some that have mobilized, but are not at war, have commenced to offer war loans.

Under these circumstances it would seem practically certain that the greatly diminished supply

of capital in Europe available for investment will, because of patriotic and business and other considerations, be invested at home, and there is no reason to hope that for a long time to come any considerable amount of European capital can be diverted, as it has been heretofore, to the purchase of new securities which the railroad companies must issue in order to refund maturing obligations and to make necessary betterments and improvements. On the other hand, these Eastern railroads will experience new difficulties in attempting to secure some scanty portion of the supply of investment capital which is not absorbed by Government loans. The competition for new capital with which they have heretofore had to contend, and which, as shown upon the former hearing, has greatly increased to them the cost of new capital, will now be greatly increased. They will have to offer their securities in competition with the vast amount of loans offered by the great European powers, as well as in competition with other foreign and domestic governmental and municipal, public utility and other railroad offerings. The demand for new capital will surely be much greater than the available supply. It inevitably follows that this great demand for capital resulting from the war and war loans will largely raise the rental price for the use of capital or interest rates, for many years to come, *and even then many who seek new capital will have to go empty-handed.* Already rates have largely

risen, both at home and abroad. The new German loan bears 5% interest, and it is understood is being put out at less than par. In this country, rates for call money and commercial paper have risen to from 6 to 8%, and borrowers of such undoubted credit as the City of New York, and one of the United States, have been obliged to pay as high as 6% or more for short time accommodation. Railroads such as the New York Central and the Erie, have been unable to refund maturing short time notes, except by the issue of other short time notes, and even then only with great difficulty and upon an interest basis of about 7% in the one case and about 8% in the other.

It is clear that one of the effects of the war will be to raise the interest rates on investment securities much higher than it has been for many years, and that these railroads will have to pay for any new capital they may be able to obtain, interest at a rate considerably higher than that paid by governments.

For reasons which have been testified to by Mr. Conant, Mr. Strauss and others, there is grave danger that the financial disturbances which will occur during the process of distribution of these Government loans to investors, extending over several years, will result in the dumping of a large volume of American securities on the American market in a manner which will cause serious further depression in their prices, and to an amount which will itself absorb so much of the

new capital available in the United States for investment that it will greatly increase the difficulty which these railroad companies have heretofore experienced in obtaining the amount necessary for their refunding and improvement purposes.

The amount of foreign capital invested in the United States has been estimated at not less than six billion dollars, of which not less than four billion dollars are represented by railroad securities. The serious consequences that would result if any considerable portion of these securities is thrown upon our market are self-evident. It was because of these dangers that the New York Stock Exchange and other exchanges in this country were closed and have remained closed. If the amount of foreign-held securities so liquidated in our market should amount to any considerable percentage of those held abroad, it would seriously tax the ability of our American investors to absorb them; it would greatly reduce the prices of the much larger volume of similar securities held in this country and seriously impair the assets of savings banks, insurance companies and similar institutions, as well as of the public generally whose savings are to a considerable extent invested in these and similar securities. It would greatly reduce and might substantially exhaust the amount of investment capital remaining in the United States available for investment in new railroad issues, so as to most seriously impair the ability of these carriers to

procure the new funds necessary for their continuance and development. *In the judgment of competent witnesses, this apprehended liquidation of our foreign-held securities will be substantially retarded or accelerated according as to whether the railroads are now permitted to charge such just and reasonable rates as will secure them adequate net revenues.* As testified by Mr. Conant:

“Railroad securities cannot be made attractive to investors, even apart from the rate of interest, unless they are adequately secured. They cannot be considered adequately secured if earnings be kept so low that they barely meet fixed charges in years of prosperity and threaten a deficit in years of depression.”

Under the conditions now prevailing, and which are practically certain to prevail during the next few years, if these railroads are to obtain the new capital essential for their proper purposes, the newly issued securities must be attractive to the public, both in respect to the rate of interest and in respect to the evidence that they are to be permitted to charge rates that will be sufficient to produce just and adequate net revenues, which the existing rates do not afford.

The suggestion has been made by counsel that the railroads can remedy their situation by curtailing or suspending dividends. It would hardly seem that such a suggestion will receive serious consideration. Unless the railroads as a whole are

able to receive rates for their transportation services that will produce net revenues sufficient to meet reasonable dividend requirements and leave a reasonable surplus as a margin of safety to help defray "the cost of progress" and secure the future stability of rates, establish confidence in the continuation of dividends, and otherwise maintain credit, there is but little ground to believe that private investors will afford the necessary new capital.

Curtailement of dividends would aggravate the situation, while suspension of dividends would make it increasingly difficult to obtain any capital, even by the sale of bonds. Total suspension of dividends by the railroads, though it would produce a panic, would not produce the amount of new capital required.

Moreover, such a suggestion is impossible of application by a large number of railroads in Official Classification Territory which are most in need of relief and which are now unable to pay any dividends. I file herewith a statement prepared by the Bureau of Railway Economics from reports on file with the Commission, showing the amount and per cent of stock, respectively, paying no dividends and paying dividends at certain specified rates for the fiscal year 1914. The table excludes the returns of a few specified roads, such as the Boston & Maine, Buffalo & Susquehanna, Western Maryland, Hocking Valley, and Philadelphia and Reading, whose reports have not yet been filed with

the Commission, but most of which pay no dividend at the present time. It appears that out of the 73 roads listed, having stock outstanding in the aggregate of \$2,500,000,000, 40 roads pay no dividend upon capital stock amounting to over \$687,000,000, or 26.8% of the whole. Also, that five roads pay dividends of less than 4% upon a capital stock of over \$220,000,000, or 8.6% of the whole, and that 16 of these roads pay dividends of less than 6% upon capital stock aggregating about \$482,000,000, or 18.8% of the whole.

In this connection it is worthy of note that a number of the roads that appear in the table as paying some dividend last year and as being in the dividend-paying class, like the New Haven, have now passed into the non-dividend paying class and have no dividends which they can reduce for any purpose.

It is not contended by these carriers that the Commission have the power to, or should undertake to, approve rates that will be unjust or unreasonable, or that the Commission have the power to, or should undertake to, approve rates irrespective of their being just or reasonable, merely on the ground that such action would "stimulate business" or "restore confidence in the financial and business world" or accomplish any other such result, although such accomplishment might be very desirable in itself. I do, however, contend that in determining whether the carrier's charges for its transportation services are just and reason-

able, the Commission have the right, and it is their duty, to take into consideration, among other things, the adequacy of the net operating income derived therefrom, its sufficiency to enable the carrier properly to perform its important quasi-public functions, and to secure the new capital necessary therefor, and for the other related matters of public interest and welfare to which reference has been made in this case, and that this view is amply supported by both reason and authority.

In addition to all these considerations, which properly should be taken into account in determining the maximum rates which would be just and reasonable, there are other considerations of public and private interest which properly should be taken into consideration in determining the method and time of relief, if not the amount. *If there are several methods by which the Commission lawfully can enable the carriers to find relief from the existing inadequacy of their revenues, and one of these methods will also promote the welfare of, or safeguard public or private interests, while the adoption of the other method will either not accomplish that result or be doubtful in its effect, then I say the Commission should take these matters into consideration and should adopt the method of relief which will inure to the benefit of all.*

Rates to be just and reasonable must be just and reasonable to the railroad as well as to the shipper, and to secure this end Congress has conferred upon the Commission not only the power

and the duty of protecting shippers against the imposition of unjust and unreasonable rates, but also the power and duty of affording the carriers the opportunity of charging the maximum just and reasonable rates, taking into consideration the public and governmental functions they perform and the considerations of public interest and public policy in favor of their continuing and being enabled to continue to adequately perform such functions.

The railroads are the chief arteries of commerce, and transportation is its life-blood. Whatever weakens those arteries, or operates to impair their ability to perform their proper function for the body politic—which is transportation—is injurious to the body politic, and to commerce, and to public and private interests alike.

Anything that produces or threatens to accomplish such an unfortunate result cannot fail to be a matter of serious concern, not only to the owners of the railroads, and to those who, by investing in their bonds and other securities, have made possible their construction, but to all interested in the commerce and business of the country. And it also must be a matter of peculiar concern to this Commission, a great Administrative Body, constituted by Congress and by it expressly authorized and required to execute and enforce the provisions of the Interstate Commerce Act. Until the passage of that Act in 1887, Congress had not assumed the control and regulation of the railroads, generally,

except to constitute them post-roads. *By the Interstate Commerce Act, as amended, Congress has declared a new public policy toward the railroads and has adopted and made them instrumentalities of the Federal Government, with new duties and obligations to which they were not subject under the common law, or under the laws of the States that created them, but which have been newly imposed by Congress.*

The basic, and I think by far the most important provision of that Act, is that contained in Section 1, by which it is made the duty of every carrier subject to the provisions of the Act *to provide and furnish, upon reasonable request, all transportation, as broadly defined by the Act, over all the railroads, owned or operated, as broadly defined; and to establish through routes and just and reasonable rates applicable thereto; and to provide reasonable facilities for operating such through routes.*

This is one of the provisions which, by Section 12, the Commission is broadly authorized and required to execute and enforce.

Another such provision is that contained in Section 5, which requires that "in time of war or threatened war, preference and precedence shall, upon demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic."

Thus Congress has declared its policy that the railroads remain under private ownership and continue to be maintained by private capital, and—except as otherwise provided in the Act—operated under private management. It has, moreover, made them public instrumentalities, charged with the duty of performing, and being ready and prepared to perform, upon any reasonable request therefor, all transportation services which the public or Government may call upon them to perform on any reasonable notice, either in time of peace or war. Congress has recognized that the carriers cannot perform the duties so imposed unless permitted to charge rates just and reasonable to enable them to accomplish what is involved in such performance; and the Commission should take the requirements of these provisions into consideration in passing upon the question of the propriety of the proposed rates. The railroads must be given strength to accomplish,—and to be prepared to accomplish,—the task so imposed upon them,—and remunerative rates, and adequate revenues, are the very sinews of that strength.

I think this principle has been recognized in previous decisions of the Commission.

In the Western Advanced Rate case, decided February 22, 1911, the Commission, speaking by Commissioner Lane, said:

“We do not say that the carriers may not increase their income. We trust they may and confidently believe they will. If the

time does come when through changed conditions it may be shown that their fears are realized or approaching realization, or from a survey of the whole field of operations there is evidence of a movement *which makes against the security and lasting value of legitimate investments and an adequate return upon the value of these properties*, this Commission will not hesitate to give its sanction to increases which will be reasonable.”

Commissioner CLARK: In that decision that you have just referred to, the president of one of the most important systems involved testified that the making of freight rates has not, never did, and never will have, and never ought to have, any relation to the capitalization of the railroad.

Mr. BROWNELL: That is an opinion which I would not share; but, however that may be, in this case I think it has already appeared that the railroad companies, under the rates they now are charging, do not receive an adequate net income, and it is with reference to that fact that I am urging that the Commission have the right, and I think it their duty—and I think they have so recognized it in the past—to take into consideration the factors which we have endeavored to submit to you.

In the Industrial Railways case, decided in January last, during the pendency of the present case, the Commission, speaking through Commissioner Harlan, again recognized the principle above con-

tended for, saying (p. 218) that if the railroads properly conserve their sources of revenue—

“The Commission upon an adequate showing of the need of additional revenues *will not shrink from the responsibility of sanctioning such measures*, including even a general increase in rates, as may be required to bring reasonable prosperity to railroads, so far as this may be accomplished under rates and charges that are reasonably just alike to shippers and to the carriers. *Aside from the right of the owners of the property so devoted to the use of the public to receive from the public a reasonable return on their investments, it is of profound importance to the public in its own interest to accord fair and equal treatment to the owners of railroads, for upon no other basis may we continue to look to private capital for the further development and extension of our railroad facilities. The general public interest is therefore advanced in a very direct way by the reasonable success of railroad investments under rate schedules that reasonably respect the rights of shippers.*”

In the Eastern Advanced Rate case of 1910 (No. 3400) the Commission, speaking through Commissioner Prouty, said (p. 16) :

“There is another aspect in which this stock and bond factor is important. The Government has invited private capital to invest in the construction and operation of these public utilities. While it might have established the rate, it has left that to competitive forces. The public has for many

years known the results of the operations of these defendants, and their securities have thereby acquired certain values upon the market. At these values enormous private investments have been made. We were told upon the hearing of the extent to which savings banks and insurance companies held the securities, especially the bonds, of these railways. We know that private investors have bought, not for speculative purposes, but as a legitimate and permanent investment, large amounts of the stocks of many of these companies.

“Now this Government having permitted this to be done cannot close its eyes to the fact that it has been done. *We cannot be oblivious to the effect of our action upon the value of these investments, which have been made in good faith.* In this view the market value of these stocks and bonds for the last 10 years certainly, and the effect which our action may have upon their market value for the future, must be considered. *We cannot, of course, allow such rates as will in all cases guarantee or perpetuate the prices at which these stocks have been bought, but in viewing the entire situation we should have that price in mind.*”

And again (p. 19):

“Outside the United States a majority of railroad mileage is today owned and operated by the Government. It has been our policy from the first to delegate this duty to private individuals, and in this way a vast amount of private capital has been induced to invest in railroad construction and operation.

“Now the ordinary considerations of justice require that the money so invested by invitation of the Government should be allowed a fair return. This does not mean that we should permit rates which will guarantee all railroad investment, nor which will guarantee any railroad investment at all times, *but we should allow rates which will yield to this capital as large a return as it could have obtained from other investment of the same grade.* If rates formerly in effect have become insufficient, then higher rates should be permitted.”

In the majority report on the former hearing in this case, Commissioner Harlan said (p. 357) that railroads, although constructed with private capital, are public highways subject to public control, and that in constructing and maintaining such a highway under public sanction, the railroad company really performs a function of the State; that, “unlike most other countries, we have committed to the performance of this public function to companies of private ownership”; that “the policy of inviting and authorizing the performance of this public function by privately owned companies involves obligations on the part of the public to the owners of these properties” (p. 358). In the same connection it is further said (p. 359) that “the *public interest* demands not only the adequate maintenance of existing railroads, but a constant increase of our transportation facilities to keep pace with the growth and requirements of our commerce. If, however, that development is to be ac-

complished with private capital in conformity with our traditions, nothing can be more certain than that the facilities will not be provided except under such a system of regulation as will reasonably permit a fair return on the money invested."

In the light of these considerations of public interest and welfare, as well as that of the railroads, the Commission found that "the net operating income of the railroads in Official Classification territory, taken as a whole, is smaller than *is demanded in the interest of both the general public and the railroads*; and it is our duty and our purpose to aid, so far as we legally may, in the solution of the problem as to the course that the carriers may pursue to meet the situation" (p. 384).

Commissioner Daniels points out in his opinion (p. 434) that while furnishing greater and better service, both in the transportation of freight and the carriage of passengers, the net operating income of the carriers has progressively dwindled, and that "as a necessary outcome of their declining ability to show profit, the attractiveness to investors of railroad securities has correspondingly grown less;" that the return received by the carriers "is wholly inadequate, when gauged from the standpoint of justice to the carriers and on the wider score of a continuance of adequate service to the public" (p. 442); that "expected earnings constitute in the last analysis the bid which the carriers must make for new capital for needed improvements, extensions, new rolling stock, and

similar purposes. It is not necessary to say that on such a showing the investing public will hardly be eager to intrust its funds to transportation enterprises'' (p. 453); and that ''it is clear that the carriers must make a better showing of net revenue before they can as a whole enlist large additional supplies of capital'' (p. 454).

When the decision was handed down in July the Commission, although finding that the revenues of the carriers, taken as a whole, are inadequate from the standpoint of the interest of both the public and the railroads, concluded that the carriers were not facing a crisis and had no cause for alarm, and that their need of relief was not so urgent as not to permit of the investigation of the possible sources of additional revenue other than by the proposed rate increase (p. 419).

It was said in that connection that the railroad executives insisted that grave and serious responsibilities would be incurred if the Commission failed to relieve the situation by at once approving the five per cent increase; that the principal danger suggested was that the carriers would incur great difficulty in refunding their maturing short-term notes and other obligations, unless the investors were assured that the carriers' revenues would be increased immediately, but that ''subsequent developments have shown that there was little foundation for any such view.''

The majority report further expressed the opinion that (p. 420) ''the earning capacity of our rail-

roads is so great that their credit will soon be restored if their revenues are conserved. The crop estimates give promise of greatly increased gross revenues for the current fiscal year."

The view was also expressed (p. 364) that "we appear now to be recovering" from the period of depression which began "shortly after the commencement of this proceeding."

Since the hopeful views above noted were adopted and expressed by the Commission, the war has occurred, and the operations of the carriers for the year ending June 30, 1914, and for July and August, have become available, showing a continuance of the decline in operating income, notwithstanding extraordinary efforts to reduce expenses. In the light of these new facts it would seem clear that these hopeful views cannot be realized, and that the apprehensions entertained by the carriers have been justified, and that the situation is one that calls for immediate relief. Whatever doubts may have existed at the time of the former hearing, it would seem that when we consider all the facts, including those arising since the former hearing, there now can be no disagreement with the summary made by Commissioner Daniels, or with the conclusions drawn therefrom as stated in the concluding paragraphs of his opinion (p. 454), viz:

"The world-wide phenomenon of rising prices is by this time no novelty. Since 1907 the average rise in the world's price level is estimated by competent statisticians at from 30 to 50 per cent. It has mirrored itself in

the rising cost of living; it has evoked, and most properly, advances in wages and salaries; it has coincided with an increase in the nominal rate of interest where part of the interest so called is but compensation for the anticipated depreciation of the capital sum later to be repaid. This rise in the price level must eventually be reckoned with in railroading. For a time its effects may be masked by adventitious increases in the volume of traffic, but this temporary relief in its very nature is uncertain, and sooner or later the difficulty is sure to reappear. For a time it may be circumvented by extraordinary economies, but in its nature it is inexorable. It must be faced, not trifled with. It is hardly an adequate remedy to accord to carriers relief only when their returns have reached the well-nigh desperate level now shown in central freight association territory. Even before this inadequate return is evidenced, higher rates are warranted. Such a solution of the present case would have done no less than justice to the carriers, and would have promoted the welfare of the community they serve.

“A living wage is as necessary for a railroad as for an individual. A carrier without a sufficient return to cover costs and obtain in addition a margin of profit large enough to attract new capital for extensions and improvements can not permanently render service commensurate with the needs of the public. Eventually it may come about that railroads will be owned and operated by the Government. That is a matter of public policy which it is not the province of this Commission to consider. But that such a departure from the present policy of

private ownership and corporate operation should be materially hastened by the reluctance of new capital to invest in these properties would seem to be a grave indictment of our present system of regulation and control."

That a crisis now exists in the affairs of these railroads, and that their credit, seriously impaired as we believe before the war started, principally because of inadequate operating income, is now confronted by a grave emergency, would seem to be but plain truths. If this be so, we submit that the Commission should aid, so far as they legally may, in the solution of the problem by permitting the carriers to secure a more nearly adequate net income through the proposed increased rates.

The crisis which confronts the railroads has been emphasized, has been aggravated and has been made more clear and certain by the war, but the war does not constitute and did not alone create the existing crisis in our affairs. That crisis existed before the war and is reflected in the records of their operations and the long-continued increase in expenses and accompanying reduction in net revenues and income, whereby the railroad industry has been forced to become an industry of constantly decreasing returns.

The nature and extent of the public interest involved and the occasion for co-operation of those in private or in official position in aiding to meet the situation in every proper and legitimate way

are clearly indicated in the letter recently sent by the President to Mr. Frank Trumbull as Chairman of the Committee of Railroad Executives, who had presented to him some aspects of the situation. In that letter the President says:

“You asked me to call the attention of the country to the imperative need that railway credits be sustained and the railroads helped in every possible way, whether by private co-operative effort or by the action, wherever feasible of Government agencies, and I am glad to do so, because I think the need very real.

“I cannot say that I entertain any deep anxiety about the matter, except, of course, the general anxiety caused by the unprecedented situation of the money markets of the world, because the interest of the producer, the shipper, the merchant, the investor, the financier, and the whole public in the proper maintenance and complete efficiency of the railways is too manifest. They are indispensable to our whole economic life, and railway securities are at the very heart of most investments, large and small, public and private, by individuals and by institutions.

“I am confident that there will be active and earnest co-operation in this matter, perhaps the one common interest of our whole industrial life. Undoubtedly, men both in and out of official position will appreciate what is involved and lend their aid heartily wherever it is possible for them to lend it.

“But the emergency is in fact extraordinary, and where there is manifest common interest we ought all of us to speak out in its behalf, and I am glad to join you in

calling attention to it. This is a time for all to stand together in united effort to comprehend every interest and serve and sustain it in every legitimate way.

“The laws must speak plainly and effectively against whatever is wrong or against the public interest, and these laws must be observed; for the rest and within the sphere of legitimate enterprise we must all stand as one to see justice done and all fair assistance rendered, and rendered ungrudgingly.”

The various departments of the Government are now engaged in doing whatever they properly and legitimately may to aid in the restoration of normal financial and credit conditions and to protect investors and business interests generally and the public interests involved against the disasters that are threatening them. The Comptroller of the Currency has just instructed national bank examiners to pass unquestioned all collateral loans based on the closing prices for securities on the New York Stock Exchange July 30th, and to recognize those prices as determining the value of securities held as collateral for loans by national banks, notwithstanding that since that time the securities may have sold at considerably lower prices and the prices of July 30th could not now be obtained. This action is in line with the policy which has been pursued by the New York State Banking Department. The Treasury Department is co-operating to the best of its ability and the extent of its authority to the same general end, and

the Federal Reserve Board has entered earnestly upon the task of aiding the effort to relieve the cotton situation through the proposed "cotton loan fund."

It is obvious that the railroad and transportation interests of the country lie at the basis of our industrial and financial fabric, and that unless those interests can be made reasonably prosperous through adequate revenues, their financial necessities relieved, and confidence in the stability of their securities restored and maintained, no permanent relief from existing conditions can be expected. It is also obvious that the confidence of the investing public, both in this country and abroad, in the value and stability of our railroad securities has been impaired. That this is the situation has been established by the testimony, among others, of financial authorities, bankers, and economists of national and even of international standing and repute, and in their judgment, as well as in the judgment of those in responsible charge of these railroad properties, unless these conditions are promptly remedied, the effect must be disastrous to all interests, public as well as private.

In the majority report delivered by Commissioner Harlan on the former hearing, it was stated (pp. 419-420) that the credit of our railroads has undoubtedly suffered in recent years, but that this was largely from causes that were independent of their rates. The majority were inclined to at-

tribute this loss of credit and impairment of the confidence of the public in the stability of railroad securities largely to the mismanagement of some great railroad systems of international repute, to the circumstances leading up to the appointment of receivers for certain other companies, to the interlocking of railroad systems with weak lines, and other causes not related to the adequacy of rates or revenues.

However, *upon the rehearing it now appears by the uncontradicted testimony of Mr. Strauss and others, that in their opinion and in the opinion of others who are best qualified to judge*, while the considerations referred to in the majority report have operated to a relatively slight extent, yet *the principal cause for the impairment of railroad credit and the impaired confidence in the value and stability of railroad securities has been the inability of the railroad companies to increase their rates to the extent necessary to secure to them reasonably adequate net revenues*. As stated by Mr. Strauss, this is the view entertained by Sir George Paish, an eminent British authority upon the subject, and similar views have been publicly expressed both here and abroad by Herr von Gwinner, the managing director of the Deutsche Bank of Berlin, and himself one of the most eminent continental authorities upon the subject.

In January last the Bureau of Railway Economics requested the State Department to secure through our ambassadors to several European

countries, information with respect to rates and rate advances in those countries. Among the replies, copies of which were transmitted by the State Department to the Commission, was the cablegram of January 13th to the Secretary of State from Ambassador Gerard as follows:

“Average freight rate per ton, 1911, Prussian railroads, 1.213 cents; United States same, .757 cents; large eastern American lines less as Pennsylvania, .582 cents. Average compensation, Prussian railroad employees, four hundred thirty-seven dollars; United States same, seven hundred and twenty-five. Above statistics given me by director of Deutsche Bank, who says foreign investors' confidence in all American securities much shaken by hazardous financial situation, American roads, whose rates about one-half rates here have been reduced or are stationary while roads compelled to raise wages pay higher taxes and comply with many new regulations.”

Commissioner MEYER: Mr. Brownell, you say the American Ambassador compiled those figures?

Mr. BROWNELL: No, sir, I said that at the request of the Bureau of Railway Economics, the State Department made inquiries of several of our ambassadors abroad, copies of the answers to which were sent to the Commission, and one of them was read by Mr. Brandeis in his argument on the former hearing. This one relates more particularly to the question I am now considering.

Commissioner MEYER: Do you mean to say that those figures are comparable?

Mr. BROWNELL: I only give them for what they are worth, for your consideration. What I had particularly in mind was the reference to the cause of the decline of confidence in American securities.

Commissioner MEYER: Is there anything to show what service those Prussian freight rates cover?

Mr. BROWNELL: No; I simply give the information as it is; and before calling attention to it at the hearing, we inquired of the Department of State whether there was any objection to using it, and were advised that there was no objection,—of course calling attention to the fact, which I have stated, that it simply is transmitted by Ambassador Gerard.

Commissioner MEYER: If then, there is nothing with which these figures is comparable, and if there is nothing there to show what these figures mean, how can they help this Commission?

Mr. BROWNELL: What we say is that this statement from the Deutsche Bank is significant and strongly supports the testimony of Mr. Strauss and others to the effect that the existing impairment of the credit of our railroads and the lack of confidence, both here and abroad, in the safety and stability of their securities, is principally because of their inadequate rates and inadequate net revenues.

So long as such conditions continue can we rea-

sonably entertain the hope that investors abroad, or investors at home, will be favorably inclined to purchase, at least at any fair price, the new securities upon which these railroads can alone rely to provide the funds necessary for refunding maturing obligations, and for the making of necessary improvements and the other purposes essential to the continued performance of their important functions, and can we justifiably hope that the present holders of securities so threatened will be inclined to retain them if a reasonable opportunity to dispose of them occurs?

Commissioner CLEMENTS: Mr. Brownell can you tell us what questions were presented to our Ambassador abroad, whose opinions are transmitted here?

Mr. BROWNELL: The opinions of the Ambassador, Mr. Chairman, were not asked for or given, but he was simply transmitting the information given to him.

Commissioner CLEMENTS: But he transmits the opinion of others?

Mr. BROWNELL: I will file the correspondence, although copies of his answers, and I think of the others, are filed with the Commission.

Mr. BRANDEIS: Your Honor, the real question that was asked our Ambassador was to find out whether there had been any increase in freight rates in Germany. The answer, which appears by another cablegram, is that there had not been any. These apparently are voluntary views, either the

views of the Ambassador, or the views of certain financiers in Germany. * * *

Commissioner MEYER: Mr. Brownell, American railroad managers have repeatedly been asked to make comparisons of the Prussian railway rates to American freight rates, and many of them, and practically all of them, have refused to do so, on the ground that they have not been able to reduce them to a comparable basis. Assuming that to be the situation, what assistance can that be to this Commission in this case?

Mr. BROWNELL: At present I am urging it upon the Commission in view of the fact that an eminent continental authority said that, to their minds, the lack of trust and confidence in the stability of American securities was not occasioned by the few cases of mismanagement that have occurred, but was occasioned by the inability of the railroads to secure adequate rates and revenues. I think it clearly supports the statements of Mr. Strauss, Sir George Paish and others, and I think that these are facts that did not appear on the former hearing.

In the early stages of this case there was presented to the carriers the prospect of large additional revenues other than from increased rates, such as extra charges for so-called free services to industrial roads, charges for the spotting of cars on industrial sidings, charges for lighterage and switching services in New York Harbor and elsewhere, and it was urged that the carriers could and should increase their revenues from such sources

so as to render them adequate without resorting to increased freight rates.

At the first sight the glitter of the profit it was thought might thus result to the carriers blinded the eyes of many. In the light of recent events we have a clearer vision, and now we realize again the force of the familiar truth that "all that glisters is not gold."

The majority report of the Commission also made certain tentative suggestions (p. 406 *et seq.*) as to measures which might be taken by the carriers to secure additional revenues and thereby "to meet the situation" otherwise than by resorting to a general advance in their freight rates.

As shown in the carriers' petition and by the evidence of Mr. Willard and other witnesses, the carriers have given and are giving earnest attention to the recommendations and suggestions of the Commission in those regards, but *one of the new factors in the case which we think the Commission should take into consideration is that the hopes of increased revenue from most of these sources instead of having an early realization will not end in fruition in time to afford a relief for the present situation and crisis*, even though they happily may at some more remote period result in partial realization.

It is believed by those responsible for the management of the carriers that they cannot safely rely upon any expectation that the additional revenues which may ultimately be secured by the adop-

tion of means other than a general advance in freight rates can be obtained in the near future; or that when secured any such additional revenues will be adequate to meet the reasonable needs of the carriers for increased revenues in the present situation.

It was pointed out by Commissioner Daniels in this case (p. 435) that while these suggestions offered at the close of the majority report as to methods of conserving and increasing railroad revenues are interesting and significant, many of them are more or less conjectural and most of them remote in possible effect, and that, inasmuch as the Commission is not constituted by law a board of general managers of the railroads of the country, these matters ought not to delay or postpone the settlement of the questions of law and fact involved in the proceeding to determine the propriety of the proposed advanced rates, namely: the proceeding known as I. & S. Docket No. 333 as distinguished from the proceeding of inquiry instituted by the Commission (Docket No. 5860) to inquire into the matter of what general course the carriers may pursue to meet the situation resulting from their existing inadequate revenues.

In *Int. Com. Com. vs. Chicago Great Western Railway Co.* (209 U. S., 118) the Supreme Court, speaking through Mr. Justice Brewer, says:

“It must be remembered that railroads are the private property of their owners; that while from the public character of the

work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager.”

The court then significantly quotes and adopts from the opinion of Circuit Judge Jackson, afterwards Mr. Justice Jackson, in the *Party Rate* case (*I. C. C. vs. B. & O. R. R. Co.*, 43 Fed. Rep., 37, 50), these expressions, which had theretofore been three times affirmed and adopted by the Supreme Court as the true interpretation of the law, namely:

“Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.”

There have been no changes in the Interstate Commerce Act that affect the general force of this reiterated expression by the Supreme Court of its views as to the status of a railroad with respect to its relations to the public.

It was asserted by Mr. Brandeis as special counsel for the Commission in his brief on the former hearing (p. 192) that the Commission's only function is to refuse to permit increased rates except upon proof that they are just and reasonable, "*and in the absence of such proof, to prescribe a rate that will be just and reasonable.*"

In the Eastern Advanced Rate case of 1910, the Commission, speaking through Commissioner Prouty, held (p. 4) that the Commission's authority is limited to inquiring into the reasonableness of a challenged rate "*and establishing the rate or practice which is found lawful in place of one condemned as unlawful,*" and again (p. 12) "*the question before the Commission is still the same and is upon the reasonableness of the rate in effect if the advance has taken place, or upon the proposed advanced rate if the tariff has been suspended. * * * If, in our opinion, the rate is unreasonable, we must find what would be a reasonable rate and order the observance of that rate.*"

It is worthy of note in this connection that the Commission, at the conclusion of its report in that case (p. 62), required the defendants to cancel their advanced tariffs *and to restore their former rates*, which are the rates then and (substantially) for a long time prior thereto and now in effect. It is submitted that this necessarily involved a finding by the Commission that the rates so restored were not more than just and reasonable rates. Apart from other considerations the

changed conditions since 1910 would seem to be more than sufficient in themselves to justify the comparatively small increase now asked for.

The views so expressed by the Commission in the 1910 case, and by Commissioner Daniels and by counsel for the Commission in the present case, with respect to the power and the duty of the Commission to themselves determine and prescribe the maximum reasonable rates to be charged by the carriers in case the Commission determines that challenged rates are unjust and unreasonable, would seem to be fully borne out by the provisions of the Interstate Commerce Act with respect thereto.

Section 15 of the Interstate Commerce Act provides that whenever after full hearing the Commission shall be of opinion that any rates or charges charged by any carriers subject to the Act for the transportation of persons or property are unjust or unreasonable, *“the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, * * * and to make an order that the carrier or carriers * * * shall not thereafter publish, demand or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed.”*

It is further provided that all orders of the Commission shall continue in force for such period of

time, *not exceeding* two years, as shall be prescribed in the order of the Commission.

By a further provision the Commission may, as they have in this case, enter upon a hearing concerning the propriety of rates before they go into effect, and may, as therein provided, suspend the operation of such new rates, but the order which, after full hearing, whether completed before or after the new rates go into effect, the Commission are authorized to make in reference to such new rates is only such as would be proper in a proceeding initiated after the rates had become effective.

The officers of the carriers who are responsible for the management of these railroads, conscious of the responsibilities devolving upon them and of their duties to shippers, to the public at large and to the holders of their bonds, capital stock and other securities, filed with the Commission, in the manner prescribed by Congress, the advanced rates in question. They believed then, and they now believe, that such advanced rates were and are well within the limits of what would be just and reasonable. They have endeavored to present to the Commission as fully and as fairly as possible the facts bearing upon the propriety of these advanced rates in the effort to satisfy the Commission that they are just and reasonable, and in order to aid the Commission to determine what will be the maximum just and reasonable rates in case the Commission finally shall be of opinion that such advanced rates are unjust and unreasonable.

Under the law and the facts in this case, in the event that the Commission are finally of opinion that the rates are unjust and unreasonable, or in the event that they do not feel justified in allowing the rates to go into effect without exercising their power of suspension, should not they themselves presently determine and prescribe the maximum reasonable rates which the carriers will be permitted to charge and which will produce the adequate net income which the existing rates do not produce?

We hope and believe that, upon all the facts which the whole record now contains, the Commission will find that the proposed rates are no more than just and reasonable and allow them to become effective, before it is too late; but in case the Commission determine to the contrary, should they not, in that event, as a matter of sound discretion (even if they are of opinion that the provision of the statute in that regard which I have quoted is not mandatory) adopt the course indicated by the statute, instead of requiring the carriers to await the outcome of the attempted application of the tentative suggestions as to substituted measures which might be taken by them to secure additional revenue? Would not that be the better, proper and safer course to pursue in such contingency,—*particularly* in view of the fact that the carriers believe that what can be accomplished through such suggested substitute measures will be too inadequate in amount, and too remote in point of time,

to provide necessary relief, and that the record justified that belief, *and in view of the further fact that the carriers, and the great public and private interests dependent upon their future welfare, otherwise would be subjected to the great risk of such alternative measures proving to be inadequate or ineffective?*

It may be said that even conceding the correctness of the rule that the carrier is entitled to charge just and reasonable rates that will produce adequate revenues, it is difficult to apply the rule in practice, or to ascertain or in terms define it. It is true that the results cannot be determined with the ease and certainty of the application of a mathematical rule or the weighing of a commodity; but that affords no reason for abandoning a proper and logical rule, which is as definite as the constitutional guarantee that property shall not be taken without just compensation or without due process of law, or as the rules with respect to the taking of property by eminent domain. Though it were as difficult to express and define all the elements which constitute this standard, as the star by which the mariner steers his ship is unattainable, it none the less affords as safe and sure a guide.

